IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

R.S.A. NO.1440 of 1986

DATE OF DECISION: 08.09.2006

Babu Lal and others

.....Appellants

versus

Piare Lal and others

.....Respondents

CORAM:- HON'BLE MRS. JUSTICE NIRMAL YADAV

Present: Mr.Amit Jain, Advocate for the appellants

None for the respondents

..

JUDGMENT:

This is plaintiff's second appeal against the judgment and decree dated 5.3.1986 passed by the Additional District Judge, Gurgaon, vide which the judgment and decree dated 13.12.1983 passed by the trial Court has been set aside and suit of the appellants-plaintiffs has been ordered to be dismissed as having been abated.

A brief resume of relevant facts would suffice. Plaintiffs-Babu Lal, etc. filed a suit for declaration and in the alternative for possession against the respondents-defendants Piare Lal, etc., pleading that one Ganga Sahai had mortgaged with possession the land comprised in Khasra No.133 measuring 2 bighas - 2 biswas in favour of Ramji Lal vide registered mortgage deed dated 19.10.1904 for a sum of

Rs.40/- only. Chander Bhan son of Kallu also mortgaged with possession the land comprised in Khasra No.132measuring 1 bigha – 6 biswas for Rs.40/- with Ramji Lal. After the death of Ramji Lal, mortgagee, the plaintiffs became his successors-in-interest and after death of Ganga Sahai and Chander Bhan, the original mortgagors, respondents-defendants became their successors-in-interest. Pursuant to execution of mortgage deed, Ramji Lal and after his death the plaintiffs remained in possession of the suit land. The period of limitation for redemption of mortgage expired much prior to the filing of the suit and, therefore, the right of redemption in favour of the respondents-defendants had extinguished. Resultantly, the plaintiffs became the owners of the suit property. The plaintiffs' suit was decreed vide judgment and decree dated 13.12.1983 holding that they have become owners of the suit property after expiry of period of limitation for redemption of both the mortgages and defendants cannot claim that mortgages stood redeemed automatically.

Aggrieved against the judgment and decree of the trial Court, the respondents-defendants preferred an appeal before the District Judge. During the pendency of the appeal, the respondents-defendants filed two applications on 16.4.1984. One application was filed for bringing on record legal heirs of Smt. Imarti, plantiff No.32, who is stated to have died on 20.10.1980, during the pendency of the suit before the trial Court. It was pleaded that plaintiffs were under obligation to bring on record the L.Rs. of Smt. Imarti. Since they failed to do so, the entire suit abated on the expiry of period of limitation for bringing on record the legal representatives of Smt. Imarti. It was

further pleaded that in case the appellate Court comes to the conclusion that suit had not abated, the L.Rs. of Smt. Imarti be brought on record. It was further mentioned in the application that name of Smt. Imarti having been shown in the judgment and decree of the trial Court, she has been impleaded as respondent under the bona fide mistake that she was still alive at the time of filing of the appeal. It was, however, prayed that L.Rs. of Smt. Imarti be brought on record. In the other application filed on the same day, a prayer was made for acceptance of the appeal and dismissal of the suit on the ground that due to death of Smt. Imarti during the pendency of the suit in the trial court and her L.Rs. having been not brought on record during the period of limitation, the suit had automatically abated.

Both the applications were contested by the appellants-plaintiffs, pleading that the suit could not abate as the right to sue survived to the remaining plaintiffs. It was further pleaded that the suit could have been filed by anyone of the plaintiffs as the defendants had ceased to have any right, title or interest in the suit property after the right of redemption had extinguished by efflux of time. It was pleaded that each of the plaintiffs had independent right to file suit for foreclosure even after the death of Smt. Imarti and, therefore, the entire suit had not abated. The Ist Appellate Court, after taking into consideration the facts and legal proposition, allowed the application for dismissal of suit as having been abated and dismissed the application for bringing on record the Legal Representatives as having become infructuous. Resultantly, the appeal of the respondents-defendants was allowed holding that the

entire suit had abated on the death of Smt. Imarti as her Legal Representatives were not brought on record within the specified period. Being aggrieved, the plaintiffs have preferred the present appeal.

I have heard learned counsel for the parties and perused the material on record.

The real question involved in the present case is, - Whether in the event of death of one of the plaintiffs during the trial of the suit and her heirs having been not substituted and brought on record, the entire suit will abate?

Learned counsel for the appellants argued that appellants-plaintiffs are the successors-in-interest of Ramji Lal, the original mortgagee and after his death they have acquired all the rights and interest of Ramji Lal by stepping in his shoes. The land was mortgaged in favour of Ramji Lal in the year 1904 and since then Ramji Lal and after his death all the appellants-plaintiffs remained in possession of the suit property. After expiry of statutory period for getting the land redeemed, all the appellants-plaintiffs have become co-mortgagees, therefore, having an interest in the property jointly, they filed the suit to the effect that they have become co-owners in possession. The interest of undivided co-owners, therefore, should be taken to cover every inch of land, which is subject matter of the dispute as belonging to all the plaintiffs. In such a situation, even a co-mortgagee's suit without impleading other co-mortgagees would be maintainable. In support of his contention, learned counsel placed reliance on a Full Bench judgment of Patna High court in **Ram Niranjan Das vs. Loknath Mandal**, **AIR 1970 Patna 1 FB,** wherein

it is held that a suit by one of the co-sharers to obtain possession by ejecting a trespasser is maintainable even though the other joint owners are not impleaded as party. A co-sharer having an interest in the property jointly with others, is apparently a person with better title than a trespasser. The interest of an undivided co-owner or co-sharer must be taken to cover every inch of land, which may be subject matter of dispute, belonging to the co-owners. Similar view has been taken by a Full Bench of this court in the case of **Ajmer Singh (deceased by L.Rs.) vs. Shamsher Singh and others, AIR 1984 Punjab & Haryana 58 (FB)**.

Learned counsel further argued that the respondents-defendants themselves submitted an application for bringing on record the legal representatives of deceased Imarti during the pendency of the appeal. Even the name of Imarti has been mentioned as respondent in the title of the appeal, therefore, it is apparent that the defendants themselves, in a way, conceded for bringing on record the Legal Representatives of Smt. Imarti by moving an application. It is, thus, argued that the Ist Appellate Court should have allowed the application for bringing on record the legal representatives of the deceased plaintiff by not taking a hyper-technical view.

Learned counsel for the appellants further argued that as per Order 22 Rule 1 of the Code of Civil Procedure, death of a plaintiff shall not cause a suit to abate if the right to sue survives. Learned counsel argued that even after the death of one of the co-mortgagees, the right to sue survives to other co-mortgagees. Another argument raised by learned counsel

for the appellants is that a decree, passed in favour of one of the plaintiffs who had died before passing of such decree and the legal representatives of the deceased having not been brought on record, is not a nullity. Such a decree is not void nor is it open to collateral attack. At the most, it is erroneous. The learned counsel argued that the mistake can be rectified by setting aside the proceedings from the stage of death of the deceased party and directing for retrial in the presence of legal representatives of the deceased. In support, the learned counsel referred to Division Bench judgment of this Court in the case of **Ranjit Singh and others vs. Mst. Jito and others, 1980 P.L.J. 47** and also on a judgment of Lahore High Court in **Tota Ram and others vs. Kundan and others, A.I.R. 1928 Lahore 784**, wherein it has been laid down as under:-

> "I do not think that the decree can be treated as a nullity in the sense that it can be ignored altogether. As pointed out in Goda Coopooramier v. Soondarammal, (1910) 33 Mad. 167, a decree passed after the death of a party to the suit or appeal is not an absolute nullity. Such a decree is not void nor is it open to collateral attack but it is erroneous and liable to be set aside."

On the other hand, learned counsel for the respondents-defendants argued that the plaintiffs having filed one suit against all the defendants with regard to undivided specified share in the suit property now cannot take the plea that even one of the plaintiffs could have filed the suit with regard to the entire suit property and that being so, the death of one of the

plaintiffs would result in abatement of suit in toto. Learned counsel argued that the law laid down in Ranjit Singh's case (supra), would not apply to the facts of the present case. It is argued that the interest of the plaintiffs is joint and indivisible, therefore, decree passed is also with regard to their indivisible right. As such, the entire suit would abate in the absence of one of the plaintiffs having been not represented. Even the Ist Appellate Court could not determine or ascertain the share of the deceased, as the decree was passed jointly in favour of all the plaintiffs. Since the decree was passed jointly in favour of all the plaintiffs, therefore, the Ist Appellate Court has rightly held that the entire suit had abated on the death of Smt. Imarti as her legal heirs were not brought on record within the specified period.

On careful consideration of the rival submissions, I agree with the contentions raised by the learned counsel for the appellants-plaintiffs. In the present case, the plaintiffs stepped into the shoes of Ramji Lal, the original mortgagee being his successors-in-interest. Therefore, all of them have acquired the status of co-mortgagee. Admittedly, the present suit for foreclosure has been filed after the lapse of statutory period for redemption of the suit property. After the statutory period having been expired and the co-owners being in possession, merely a declaration is required to be made in their favour by the Court of competent jurisdiction. The Ist Appellate Court has held that Smt. Imarti died on 20.10.1980. However, her legal representatives were not brought on record by the plaintiffs and judgment and decree was passed in her favour along with other co-mortgagees and thus, all the

plaintiffs were declared co-owners by way of prescription as period of limitation of redemption had expired much prior to the filing of the suit. The respondents-defendants have failed to prove that their predecessors-in-interest had got the suit land redeemed in the year 1934 and obtained possession of the suit property. They also failed to prove their possession over the suit property. As per the provision of Order 22 Rule 3 of the Code of Civil Procedure, death of a plaintiff would not cause the suit to abate if the right to sue survives.

As discussed above, the right of the other co-owners survives even if one of the plaintiffs had died during the pendency of the suit. Therefore, the finding of the Ist Appellate Court that the suit shall abate on the death of one of the plaintiffs on account of her legal representatives having been not brought on record, is not based on correct appreciation of law and fact. The Ist Appellate Court in paragraph 16 of the judgment has mentioned that it could have considered the question of remanding the case back to the learned trial Court for proceedings further from the stage of death of Smt. Imarti, but no such application was moved by the plaintiffs for bringing on rcord the legal representatives of deceased Imarti. Such a finding recorded by the Ist Appellate Court is not correct. In appeal, the respondents-defendants had themselves mentioned the name of Smt. Imarti as one of the respondents. It was the duty of the appellants before the Ist Appellate Court to implead the legal representatives of deceased Imarti in the appeal. The appeal was instituted on 12.1.1984 and

application for bringing on record legal representatives of deceased Imarti was filed by the respondents-defendants on 16.4.1984. In such circumstances, there is yet another aspect of the matter to be considered. The factum of respondents' having moved an application for bringing on record the legal representatives of the deceased plaintiff in their first appeal itself shows that they had virtually conceded the proposition of bringing the legal representatives of deceased Imarti on record. In case their application was allowed, it would have the effect of bringing on record the legal representatives on record not only in the appeal but also in the suit. The only thing which would remain to be done was the ministerial act of correcting the index of the parties in the appeal as well as in the suit. In view of the fact that defendants were themselves seeking impleadment of legal representatives of deceased plaintiff in their appeal, any delay in moving the application for the purpose being subsequent in point of time became meaningless. In such a situation, the matter could be remanded to the trial Court for proceeding further from the stage of death of Imarti after bringing her L.Rs. on record. In the present case, since the application for bringing on record legal representatives was filed by the respondents-defendants in their appeal before Ist Appellate Court), therefore, remanding the case back to trial Court, would not serve any purpose as the application filed by the respondents-defendants could be allowed even at this stage as the appeal is continuation of the suit and, therefore, the

doctrine of merger would apply. If a judgment or order of the inferior Court is subjected to appeal before the superior court and in such proceedings any order or judgment is passed by the superior court determining the rights of the parties, it would supercede the order or judgment passed by the inferior court and judgment or order of the inferior Court would be deemed to lose its identity and merge with the judgment of the superior Court.

In my opinion, the application made by the respondents-defendants for impleadment of legal representatives of the deceased plaintiff before the Ist Appellate Court deserves to be allowed and once it is allowed it would have the effect of bringing the legal representatives of deceased Imarti on record not only in appeal before the Ist Appellate Court but also in the suit and present appeal as well. Accordingly, the aforesaid application made by the respondents-defendants for impleadment of legal representatives is allowed.

In view of the above discussion, this appeal is partly allowed and judgment & decree passed by the Ist Appellate Court is aside. Since the Ist Appellate Court decided the appeal only on the question of abatement and did not deal with the merits of the case, therefore, the finding on abatement having been upset, the matter is remitted back to the Ist Appellate Court for deciding the appeal on merits in accordance with law.

8th September, 2006 **(NIRMAL YADAV)**
pc **JUDGE**